IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 869 OF 2005

1. Shri Rajendrakumar Banvarlal
Jain and ors. .. Appellants

Vs.

1. Balaji Developers and Ors. .. Respondents

Mr. A.Y. Sakhare, Sr. Counsel with Mr. P.M. Shah for the appellants.

Mr. H.S.S. Murthy with Mr. Sanjay Patankar for Respondent Nos.1 and 2.

Mr. Ketan Chotani i/by M/s. Simil Purohit for Respondent Nos.3 and 4.

CORAM: B.H. MARLAPALLE, J.

Date : October 17, 2005.

P.C.:

1. Heard Mr. Sakhare, the learned Senior Counsel with Mr. Shah for the appellants and Mr. Murthy the learned counsel for the respondent nos.1 and 2 and Mr. Chotani the learned counsel for the respondent nos.3 and 4.

2. Admit. Respondents waive service. Appeal is taken up for final hearing forthwith.

3. This appeal arises from the order dated 22/8/2005 passed by the learned Judge of the City Civil Court at Mumbai making Notice of Motion No.2915 of 2005 filed in S.C. Suit No.3251 of 2005 absolute in the following terms:-

> "1. The defendants are hereby temporarily restrained from making forcible entry or causing obstructions to the possession of the plaintiffs over the suit shops no.1 and 2 situated in building Krishnamai, CTS No.470 and 477 of village Malad, Taluka Borivali till decision of the suit.
>
> 2. The present order of injunction shall be operative and effective from 1st September, 05."

3. It appears that the respondent nos.1 and 2 are plaintiffs in S.C. Suit No.3251 of 2005. The first plaintiff is a partnership firm with plaintiff no.2 and two others, namely, present respondent nos.3 and 4 as it s partners. Respondent No.3 is the son of

respondent no.4 and the partnership firm has constructed a building known as "Krishnamai" at Turel Pakhadi Road, Malad (West), Mumbai - 64 having ground plus seven floors. The partners claim that the partnership deed entered between them is firstly on 14/8/1998 ad subsequently on 20/12/2001. The plaintiffs filed the suit on or about 11/8/2005, initially against the present appellant nos.1 and 2 and prayed for declaration and permanent injunction in respect of shop nos.1 and 2 on the ground floor of the building known as Krishnamai and situate on the plot of land bearing CTS Nos.470 and 477 near Liberty Garden of village Malad. As per them the present appellant nos.1 and 2 who had no title to the suit shops were interfering with the possession of the plaintiffs in respect of the said shops and they have no right to disturb or take forcible possession of the said shops. Though the defendants have filed reply, the trial court was of the view that it had the pecuniary jurisdiction to entertain the suit and the plaintiffs had made out a prima facie case for granting a temporary injunction in their favour. The trial court also noted that the balance of convenience

was in favour of the plaintiffs. The trial court recorded a finding that the suit being for declaration and perpetual injunction it was rightly valued and court fees was paid under Section 6(iv)(j) of the Bombay Court Fees Act and, therefore, the point of pecuniary jurisdiction raised by the defendants was answered in favour of the plaintiffs. So far as the possession of the suit shops is concerned, the trial court noted that there was no document to show that plaintiff no.1 firm had ever authorised its other partners Ajit and Vasundhara Pangam to execute the agreement on behalf of the plaintiff-firm and even otherwise in the agreement brought on record by the defendants the column of date in para no.11, the date of possession was blank. As per the trial court the receipt of payments made by the defendant nos.1 and 2 to Amit Pangam could not be held to have received, prima facie, by the partnership firm and the agreement draft was forwarded to plaintiff no.2 who did not sign the same and, therefore, prima facie, the agreement dated 16/6/2005 was not reliable.

4. There is no dispute that after the impugned

order was passed on 22/8/2005 the present respondent nos.3 and 4 took out Notice of Motion No.3105 of 2005 on or about 1/9/2005 and claimed that they were duly authorised to enter into agreement on behalf of the plaintiff no.1-firm, they had entered into an agreement with the present appellants on 16/6/2005, the possession of the shops was handed over to the defendant nos.1 and 2 on or about 14/4/2005 and the consideration amount as stated in the agreement was received by them and utilised for the purposes of the plaintiff no.1 firm. They also claimed that the partnership was not registered, though registration applications were submitted. Consequently the plaint came to be amended by adding the present respondent nos.3 and 4 as defendant nos.5 and 6 and the present appellant nos.3 and 4 as defendant nos.3 and 4. Original defendant no.3 was deleted as he was no more.

5. The present appellants claim that their transaction with the respondent nos.3 and 4 is bonafide and the agreements dated 16/6/2005 have been duly registered. They have paid full consideration amount pursuant to the said agreements and possession

of the suit shops was handed over to them by the respondent nos. 3 and 4 on behalf of the plaintiff no.1 firm. They alleged that there are differences between the husband of plaintiff no.2 and the present respondent nos.3 and 4, but these inter se differences between the partners would not in any way affect their transaction, more so when the present respondent nos.3 and 4 have admitted that possession of the suit shops was handed over to the appellants even before the agreements dated 16/6/2005 were signed and registered. These additional facts, as claimed by the appellants as well as the respondent nos.3 and 4, were not before the trial court. The learned counsel for the appellants submitted that when the plaintiff-firm is not registered, bar of Section 69 (2) of the Indian Partnership Act, 1932 would operate and the suit would not be maintainable on that count itself. This issue goes to the root of the case and it could not be taken up by the original defendant nos.1 and 2 as they believed that plaintiff no.1 was a registered partnership firm. Mr. Murthy, the learned counsel for the plaintiffs countered this argument by referring to the averments made in para 5 of the

plaint and submitted that there was no agreement between the plaintiff no.1 firm and the defendant nos.1 to 4 in respect of the suit shops and the said defendants had entered into some secret understanding with defendant nos.5 and 6 which was not binding on the plaintiff no.1 firm and, therefore, the provisions of Section 69 (2) of the Indian Partnership Act would not operate in the instant case.

6. The prayer clauses in the plaint i.e. prayer clause (a) and (b) would clearly imply that the agreements dated 16/6/2005 would have to be discarded or declared as null and void because all the defendants claimed that the suit shops have been sold to defendant nos.1 to 4 in terms of the said agreements. Under the circumstances, the reliance by Mr.Murthy on the decision of the Apex Court in the case of M/s. Haldiram Bhujiawala and anr. vs. M/s. Anand Kumar Deepak Kumar and anr. reported in AIR 2000 SC 1287 will have to be examined by the trial court on the basis of the contentions of the respective parties i.e. the plaintiffs on one hand and the defendants - other partners as well as

purchasers on the other hand. In Haldiram's case their Lordships observed as under:-

> "... the contract by the unregistered firm referred to in Section 69(2) must not only be one entered by the firm with the third party-defendant but must also be one entered into by the plaintiff firm in the course of the business dealings of the plaintiff's firm with such third party-defendant".

6A. Whether the plaintiff no.1 is a registered firm or not is a mixed question of fact and law and, therefore, the same issue can be gone into by the trial court and if the same issue is answered against the plaintiffs finally, they will be ousted from the trial court. In addition, the defendant nos.1 to 4 claim the title to the suit shops through registered sale deeds/agreements and whether the defendant nos.5 and 6 had a valid authority to sign such agreements/ sale deeds on behalf of the plaintiff no.1 firm is also a mixed question of fact and law which will have to be gone into by the trial court. Thirdly, it has been contended by defendant nos.5 and 6 that the money received from defendant nos.1 to 4 has been utilised for the business purposes of plaintiff no.1. On these obtaining circumstances, the order impugned is

unsustainable and, therefore, the appeal succeeds partly.

7. The appeal is hereby allowed and the impugned order is quashed and set aside. Notice of Motion No.2915 of 2005 is restored to the file and it shall be heard and decided along with Notice of Motion No.3105 of 2005 after deciding the preliminary issue regarding the status of the plaintiff no.1 i.e. whether it is a registered firm or not. This shall be done as expeditiously as possible and preferably within a period of six months from the date of receipt of the writ from this court. Status quo on the date the suit was filed in respect of the suit shops shall continue until the Notices of Motion are decided by the trial court. Record and Proceedings be sent to the trial court forthwith.

(B.H. Marlapalle,J.)